IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-6256

UNITED STATES OF AMERICA,
ex rel. EMILIO BOLON,

Petitioner,

vs.

VINCENT P. RIGAN, Superintendent, New Jersey State Prison, Leesburg, N. J.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

CLIFFORD E. CROSS,
Acting Passaic County Prosecutor,

GARY H. SCHLEGEL,
Special Deputy Attorney General,
Attorneys for Respondent,
New Court House,
Paterson, New Jersey, 07505.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-6266

UNITED STATES OF AMERICA,
ex rel. EMELIO ROLON,

Petitioner,

vs.

VINCENT J. REGAN, Superintendent, New Jersey State Prison, Leesburg, N. J.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Statement of the Case

The presentation of the facts as contained in the opinion of the Appellate Division of the Superior Court of New Jersey and the United States District Court, con-

tained in the Appendix submitted by Petitioner herein adequately set forth the presentation of facts necessary to the issues involved in this petition. Respondent therefore will not recite the particulars of the lengthy testimony but may make specific references thereto in the argument. The statement of the case submitted by Petitioner is substantially correct. It does appear, however, that while State witness Hector De Jesus, one of several witnesses to the actual shooting, did make a pre-trial statement in which he said he had not seen the gun in the hand of Emelio Rolon, he testified to observing Emelio Rolon hold a gun in his right hand, shoot Jose Torres, then Robert Torres twice, and then a third man.

As regards the trial court's instruction, it should also be noted that the request to charge which had been submitted at trial was not in the form which Petitioner had urged below should have been given: the requested instruction concerning intoxication spoke only of negating the element of premeditation and deliberation, to preclude a finding of guilt for second degree murder; a requested instruction on manslaughter was directed to whether petitioner had acted without malice upon a reasonable provocation. (See the opinion of the District Court below, Appendix to Petition, pp. 12, 13; opinion of the Appellate Division of the Superior Court of New Jersey, Appendix to Petition, p. 19). As was noted by the Appellate Division, in language quoted by the District Court, instructions were given to the effect that if defendant's capacity to deliberate and premeditate was affected by drunkenness, the crime is murder in the second degree, and that besides speaking of a killing done in the heat of anger with provocation, a killing done with less than an intent to kill is manslaughter. (Opinion of the District Court, Appendix to Petition, p. 8; opinion of the Appellate Divisior of the Superior Court, Appendix to Petition, p. 19).

No exception had been taken to the portion of the charge challenged on the application for the writ of habeas corpus (Opinion of the District Court, Appendix to Petition, p. 9).

ARGUMENT

The matters raised by Petitioner, as decided by the Court of Appeals in affirming the judgment of the District Court, do not represent a conflict with the applicable decisions of this Court; nor do the holdings of the Courts below constitute erroneous findings of fact or conclusions of constitutional law so as to mandate review by this Court upon grant of writ of certiorari.

Through the present petition, Petitioner raises again the contentions of constitutional error that were presented to the United States District Court upon the petition for writ of habeas corpus, which were there rejected in the denial of said petition. These findings were implicitly approved by the Court of Appeals which, upon consideration of the same contentions, affirmed the judgment of the District Court. As a brief review of the claims of error will show, the resolution of these matters by the Court did not represent a conflict with applicable decisions of this Court nor were the factual findings below, to the conclusion that petitioner was not deprived of his Constitutional rights, erroneous. We submit there exist in the present matter none of the "special and important reasons" as would merit review by this Court.

The initial contention of Constitutional error raised pertains to the admission of the dying declaration of Robert Torres, admitted in accordance with Rule 63(5) of the

New Jersey Rules of Evidence, which petitioner asserts to have resulted in a violation of his right to confront and cross-examine the witnesses against him. It is well-settled, however, that the admission of a dying declaration as an exception to the hearsay rule, does not violate the right of confrontation under the Sixth and Fourteenth Amendments of the Constitution. See *Mattox* v. *United States,* 156 U. S. 237, 243, 15 S. Ct. 337, 39 L. Ed. 409, 411 (1895); *Pointer* v. *Texas,* 380 U. S. 400, 407, 85 S. Ct. 1065, 13 L. Ed. 2d 923, 928 (1965). Petitioner asserts that it was doubtful that Torres was under an impending sense of death or that he was otherwise not under a physical inability to submit to cross-examination apparently asserting the argument that was unsuccessfully urged below that the State was acting improperly in determining to obtain a dying declaration rather than a previously scheduled deposition. The record, to the contrary, is replete with expert medical evidence of the deteriorated nature of the declarant's condition at the time of the statement (he died two days after the statement was taken, the physicians having concluded he was dying, that his condition was very poor, progressively going down hill, and demise imminent) and of a showing, through his own acknowledgments and otherwise, that the declaration was made under a consciousness of impending death. The record overwhelmingly supports the conclusions of both the District Court and the Appellate Division of the Superior Court of New Jersey that the State was faced with an emergent situation and was not acting in anything other than good faith when it took the dying declaration. These findings and the determination of the Courts below that the defendant was therefore not deprived of his Constitutional rights are manifestly supported by facts as presented at trial and clearly do not present a cause for review by this Court. We would also reject the contention that this case represents in some manner a proper

vehicle for the Court to establish procedures for the taking of dying declarations. As evidenced by the consideration of the question herein below, the State trial and Appellate Courts, as well as the United States District Courts and Courts of Appeal upon application of a writ for habeas corpus, are entirely capable of fully and fairly adjudicating and reviewing questions regarding both the evidential requisites for the admissibility of a dying declaration and of the application of Constitutional rights and due process that may be attendant thereto. The taking of the declaration in the instant matter has been held not to have effected a Constitutional deprivation and we submit, no showing has been made that the determination below is in conflict with relevant decisions of this Court or of the Circuit Courts of Appeal as would necessitate its review by this Court either in the particular situation herein or for guidance in other circumstances where such statements are given in the absence of cross-examination.

The claim of Constitutional error regarding the erroneous instruction on intoxication as permitting acquittal and the failure to charge, as subsequently urged, on intoxication as permitting a verdict of guilt of second degree murder or of manslaughter, was rejected by the District Court which found, under all the circumstances, that no error existed which would warrant habeas corpus relief. The Circuit Court affirmed. Respondent submits the Court below did not err. We are not presented in this issue with a question meriting review by certiorari. It has been well settled in the Federal Courts that trial instructions are not cause for habeas corpus relief unless so egregiously violative of defendant's rights as to constitute a denial of a fair trial in the constitutional sense. *Bassett* v. *Smith*, 464 F. 2d 347 (5th Cir. 1972) cert. den. 410 U. S. 991, 36 L. Ed. 2d 190, 93 S. Ct.

1509, reh. den. 411 U. S. 978, 36 L. Ed. 2d 700, 93 S. Ct. 2154 (1973); *Pleas* v. *Wainwright,* 441 F. 2d 56 (5th Cir. 1971); *Young* v. *State of Alabama,* 443 F. 2d 854 (5th Cir. 1971), cert. den. 405 U. S. 976, 31 L. Ed. 2d 251, 92 S. Ct. 1202 (1972); *Shepherd* v. *Nelson,* 432 F. 2d 1045 (9th Cir. 1970); *Michael* v. *Eyman,* 462 F. 2d 626 (9th Cir. 1972) cert. den. sub nom. *Michael* v. *Gomes,* 409 U. S. 1041, 34 L. Ed. 2d 491, 93 S. Ct. 527 (1972); *Linebarger* v. *State of Oklahoma,* 404 F. 2d 1092 (10th Cir. 1968), cert. den. 394 U. S. 938, 22 L. Ed. 2d 470, 89 S. Ct. 1218 (1969); *United States ex rel. Powell* v. *Commonwealth of Pa.,* 294 F. Supp. 849 (E. D. Pa. 1968), appeal dismissed, 425 F. 2d 267 (3rd Cir. 1970); *United States ex rel. McCowin* v. *Powell,* 345 F. Supp. 149 (M. P. Pa. 1972), aff'd 487 F. 2d 1396 (3rd Cir. 1973). It is to be emphasized that the question raised herein is not concerned with an asserted impropriety of an instruction clearly violative of specific Federal due process guarantees, such as an instruction infringing on the accused's right against self-incrimination. Rather the claim of constitutional error relates to the adequacy of instructions on reduced charges of homicide, a claim which has already been found wanting when raised as plain error before the State court of review. The Appellate Division of the Superior Court of New Jersey, noting the thrust of the defense presented (self-defense), the limited nature of the requests to charge, the failure to take exception to the charge on this point, and the fact that the instructions given did refer to the potential verdicts of second degree murder and manslaughter, concluded that under the totality of the circumstances prejudicial plain error had not been established (Appendix to Petition p. 19). The District Court, also having considered all the proofs presented in this case (despite thereafter noting from *Henry* v. *Mississippi,* 379 U. S. 443 (1965) the lack of obligation to consider the issue) concluded there was no error in the

challenged instructions "much less any that would warrant relief in this proceeding." (Appendix to Petition, p. 10). See, also, *Pleas* v. *Wainwright,* supra, 441 F. 2d 56 at 57; *Gist* v. *State of Oklahoma,* 371 F. Supp. 541, 542 (E. D. Okla. 1974). The holding in *People* v. *Castillo,* 70 Cal. 2d 274, 74 Cal. Rptr. 385 (1969) and dicta in *United States ex rel. Powell* v. *Commonwealth of Pa., supra,* cited also by Petitioner to the Court of Appeals are, due to such distinguishing factors as the manner of defense proffered and adequacy of the charge given here, clearly inapplicable to support the contention the instruction should have been viewed as plain error on the state level or as such as to have, in any manner, necessitated relief in the Federal Courts. The propriety of the determination of the District Court, as affirmed by the Court below, is established and there is no warrant for a further review by the Court.

Similarly, the argument that the State's use of a prior inconsistent statement of co-defendant Enrique Rolon to impeach his credibility deprived petitioner of his rights of due process and equal protection under the Sixth and Fourteenth Amendments is likewise baseless. Enrique Rolon had been called to the stand as a witness for petitioner, called by petitioner's counsel. The State thereupon sought to impeach his credibility by questioning him regarding a prior statement to the police inconsistent with his testimony. It is clear, as so held by the District Court, that the use of the prior inconsistent statement in these circumstances was not precluded by *Bruton* v. *United States,* 391 U. S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968). There was no effort here to receive a co-defendant's confession or other statement into evidence in denial of an accused's right of confrontation. As stated by Judge Lacey, the use of the statement was permissible "because the declarant, petitioner's co-defendant,

had taken the stand, and indeed was subject to confrontation by the petitioner himself." (Appendix to Petition, p. 11). It has been amply established that no Constitutional deprivation results therefrom. *United States ex rel. Pugach* v. *Mancusi,* 441 F. 2d 1073 (2d Cir.) cert. den. 404 U. S. 849, 30 L. Ed. 2d 88, 92 S. Ct. 156 (1971); *Lewis* v. *Yeager,* 411 F. 2d 414 (3rd Cir.), cert. den. 396 U. S. 923, 24 L. Ed. 2d 204, 90 S. Ct. 256 (1969); *United States* v. *Austin,* 459 F. 2d 315 (3rd Cir.), cert. den. sub. nom. *Lewis* v. *United States,* 409 U. S. 92, 34 L. Ed. 2d 180, 93 S. Ct. 251 (1972); *United States* v. *Maddox,* 492 F. 2d 104 (5th Cir. 1974); *United States* v. *Fountain,* 449 F. 2d 629 (8th Cir.), cert. den. 405 U. S. 929, 30 L. Ed. 2d 802, 92 S. Ct. 981 (1972); *United States* v. *Smith,* 451 F. 2d 595 (9th Cir. 1971). The record clearly shows the witness was available for confrontation, and, indeed, was cross-examined by petitioner. It should also be noted that the trial court fully charged the jury that the statement was being used to impeach the credibility of the witness, Enrique Rolon, and did not go to prove the issue of guilt or innocence of the petitioner. This is no valid claim of Constitutional error on this point as to require the grant of certiorari.

As regards the admission of the statement given by petitioner upon his discovery by the police in the tavern cellar, "Those men were going to shoot me so I took the gun away from them and shot them.", it was the State's position before the Circuit Court of Appeals that it may properly have been considered as within the general on-scene questioning exception specifically provided in *Miranda* v. *Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). E.g. *State* v. *Gosser,* 236 A. 2d 377, 50 N. J. 438 (1967) cert. den. 390 U. S. 1935, 20 L. Ed. 2d 295, 88 S. Ct. 1434 (1968); *State* v. *Hill,* 505 P. 2d 704, 211 Kan. 239 (1973). Such had been the determination of the Ap-

pellate Division of the Superior Court of New Jersey (Appendix to Petition, p. 20). The District Court disagreed, determining that the statement was not voluntary, made under circumstances where "The *Miranda* time had arrived." (Appendix to Petition, p. 13).* However, the Court, noting that this did not require issuance of the writ, concluded that its admission herein could not be said to be anything other than harmless error. *Chapman* v. *California,* 386 U. S. 18, 19 L. Ed. 2d 705, 87 S. Ct. 258 (1967); *Harrington* v. *California,* 395 U. S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969); *Milton* v. *Wainwright,* 407 U. S. 371, 33 L. Ed. 2d 1, 92 S. Ct. 2174 (1972). Respondent was and remains in full accord with this ultimate finding of harmless error by the District Court, unsuccessfully challenged by Petitioner before the Court of Appeals upon substantially the same argument put forth in the present petition. The judgment of the Court of Appeals, affirming the determination of the District Court, is fully warranted. As noted by the District Court, the statement of petitioner was fully consistent with the defense and testimony proffered, to establish the claim of self-defense. Contrary to petitioner's contention, the statement did not preclude presentation of a valid self-defense assertion. As noted by Respondent below, had a jury accepted the

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* Immediately after the initial statement, petitioner was arrested and advised of his rights; he volunteered that he shot "them", and said "they bothered me and I shot them."; he subsequently gave an oral statement, again after being advised of his rights, in which he stated Roberto Torres pulled a gun and he "took the revolver away from them and shot them." It was urged before the Court of Appeals that the subsequent statements should have been excluded due to the failure to give the warnings before the initial on-scene question and response. Apparently Petitioner presently does not contest addmission of these statements found by the District Court to be made after full warnings, voluntarily and with understanding.

petitioner's contention that he was confronted by an imminent jeopardy of being shot, the statement to the police being supportive of such a claim, the duty to retreat would not be applicable under State law and defendant might have prevailed on a self-defense claim. *State* v. *Abbott,* 174 A. 2d 881, 36 N. J. 63 (1961). The lack of prejudice was clearly established so as to have properly considered its admission to be harmless error. See, e.g., *United States* v. *Hatcher,* 496 F. 2d 529 (9th Cir. 1974); *United States* v. *Maxwell,* 484 F. 2d 1350 (5th Cir. 1973). It is submitted that no adequate showing has been made either to put such determination in doubt or as would otherwise mandate reconsideration of the harmless error doctrine through review of this matter by this Court.

In as much as the State submits there was no error of Constitutional dimension or if such, it was only harmless and did not deny petitioner a fair trial, Respondent further submits that the assertion of collective error depriving petitioner of due process is also without merit. This assertion of error had also been urged upon the Court of Appeals and was implicitly rejected by the affirmance of the judgment of the District Court. Again, certiorari is not warranted upon a mere claim of incorrectness of such a determination.

CONCLUSION

For the reasons stated above, Respondent says that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CLINTON E. CRONIN,
Acting Passaic County Prosecutor.

GARY H. SCHLYEN,
Special Deputy Attorney General,
Attorneys for Respondent.